

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1481
78-1001

To be argued by
HAROLD JAMES PICKERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1481, 78-1001

UNITED STATES OF AMERICA,

—v.—

DANIEL SCOTT PALTER AND ANDY CASTRO,

Appellee,

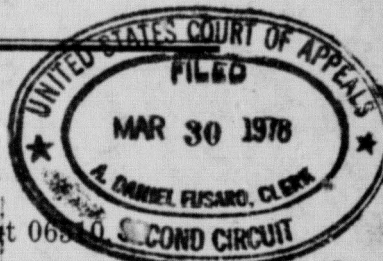
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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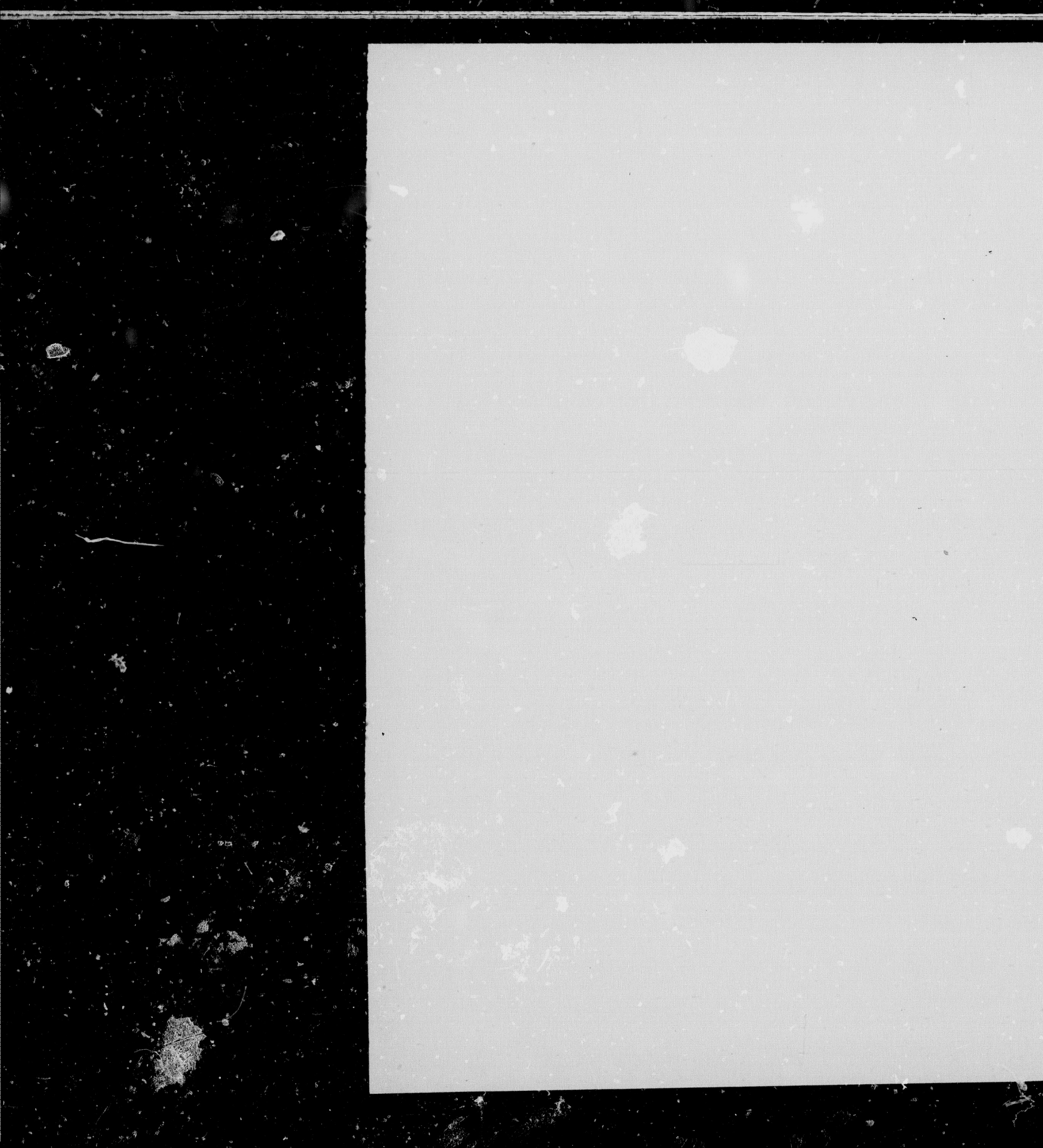


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United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL SCOTT PALTER and ANDY CASTRO,

Appellants.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from judgments of the convictions in the United States District Court for the District of Connecticut (Zampano, J.) entered by the Court on November 21, 1977, after pleas of guilty entered on September 27, 1977.

On June 29, 1977, a Grand Jury at Hartford, Connecticut, returned a two-count Indictment (Criminal No. N 77-89) charging Daniel Scott Palter, Owne Bradley Davies and Andy Castro with the unlawful manufacture of amphetamine, a Schedule II non-narcotic controlled substance, in violation of 21 U.S.C. 841(a)(1), and with conspiracy to manufacture amphetamine and methaqualone, Schedule II non-narcotic controlled substances, in violation of 21 U.S.C. 846. On September 27, 1977, Castro, Davies and Palter entered pleas of guilty to the conspiracy count of the Indictment. On November 21, 1977, Castro was sentenced to the custody of the Attorney

General for a period of eighteen months, followed by a two year special parole term; Davies was sentenced to the custody of the Attorney General for a period of one year, followed by a two year special parole term; Palter was sentenced to the custody of the Attorney General for a period of four months to be followed by a two year special parole term.

Timely notices of appeal to this Court were filed by Castro and Palter. Davies has not appealed.

Statutes and Rules Involved

Title 21, United States Code:

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

* * *

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both. If any person

commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than \$30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

Rule 11, Federal Rules of Criminal Procedure:

* * *

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right

to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

Questions Presented

1. Whether the Court below abused its discretion in the sentences it imposed upon Castro and Palter?
2. Whether the judgments of conviction of Castro and Palter must be vacated for failure to comply with the provisions of Rule 11, F.R.Crim.P.?

Statement of Facts

The facts of this case were set forth by the Government at the time that the guilty pleas were tendered to the Court, and are reproduced in the appendix to Castro's brief at 11-16,¹ and in the appendix to Palter's brief at 17-22.² Prior to the entry of the pleas, Palter had agreed

¹ Hereinafter referred to as C.App.

² Hereinafter referred to as P.App.

to cooperate with the Government, and had provided a full statement detailing both his own participation in the scheme, and the participation of his co-defendants. As a result of this cooperation, the sentencing Judge was fully advised of the extent and nature of Palter's cooperation. P.App. 37. Castro did not cooperate; however, the Government agreed to dismiss Count One of the Indictment against him in return for his plea of guilty.

When the guilty pleas were tendered, Judge Zampano conducted a full inquiry of each Defendant pursuant to Rule 11, F.R.Crim.P. C.App. 3-11; P.App. 7-24. Upon being satisfied that the pleas were knowing and voluntary, the pleas were accepted by the Court. C.App. 44; P.App. 22.

Both Castro and Palter were sentenced on November 21, 1977. The full transcript of the sentencing proceedings appears at C.App. 34-46, and P.App. 24-37. After giving full consideration to Palter's cooperation, P.App. 31, and to his psychological difficulties, P.App. 30, Palter was sentenced to the custody of the Attorney General for a period of four months. Palter's request that this sentence be served on weekends was denied by the Court. P.App. 81.

With respect to Castro, the Court gave full consideration to his age, and his role in the conspiracy. C.App. 94. After considering these factors, plus the entire presentence report,³ Castro was sentenced to the custody of the Attorney General for a period of eighteen months, the most severe sentence of the three Defendants.

From these judgments, Castro and Palter have appealed to this Court.

³ The presentence report with respect to each Defendant has been filed under seal with this Court.

ARGUMENT

I.

The Court Did Not Abuse Its Discretion In Sentencing Palter and Castro.

Both Palter and Castro argue that the Court below abused its discretion in sentencing them: Palter because the Court refused to impose, as a condition of its sentence, that the four-month sentence might be served on weekends, and Castro, because the Court imposed a sentence of eighteen months, which was longer than had been imposed upon either of Castro's co-defendants.

Castro and Palter entered pleas of guilty to one count of a two-count Indictment charging them with violations of the Controlled Substances Act, 21 U.S.C. Section 801 *et seq.* The Indictment charged both a substantive violation, the manufacture of amphetamine, a Schedule II non-narcotic controlled substance, and conspiracy to manufacture both amphetamine and methaqualone, Schedule II non-narcotic controlled substances. Palter and Castro both pleaded guilty to the conspiracy count; upon sentencing, the substantive count was dismissed with respect to all defendants upon motion of the Government.

The Supreme Court has held that a sentence in a criminal case, if within statutory limits, is not subject to appellate review. *United States v. Tucker*, 404 U.S. 443, 447 (1971); *Gore v. United States*, 357 U.S. 386, 393 (1957). Moreover, there is a long line of decisions by this Court which follow this rule. *Counts v. United States*, 527 F.2d 542 (2d Cir. 1975), *cert. denied*, 426 U.S. 923 (1976); *United States v. McCord*, 466 F.2d 17 (2d Cir. 1972); *United States v. Dzialak*, 441 F.2d 212 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971); *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970); *United*

States v. LoDuca, 274 F.2d 57 (2d Cir. 1960). Most recently, in *United States v. Kaplan*, — F.2d — (2d Cir. Docket No. 77-1428, February 3, 1978, Slip Op. 1465), this Court noted,

The real claim on this appeal is that, in light of appellant's comparative youth when he committed the crime, his six month imprisonment in a Mexican jail under allegedly deplorable conditions, his near fatal gun-shot wound inflicted by a confederate, and his changed attitudes, he should have been sentenced as a Young Adult Offender and been given probation. In view of appellant's extensive dealings for profit in controlled substances, and the circumstances of his arrest under an assumed name, nine months after bench warrant had been issued, we do not know whether such treatment would have been appropriate. *In any event, under the present state of the law, it is not our prerogative to make such judgments, and we refrain from doing so here.* (emphasis added).

United States v. Kaplan, *supra*, Slip Op. at 1467-68.

While the general proposition that appellate review of sentencing determinations is usually followed, there are circumstances under which an appellate court may review such determination. Thus, when the sentencing judge relied upon materially incorrect information, or sentenced for improper reasons, *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 745 (1977); *United States v. Tucker*, *supra*, 404 U.S. at 443; *United States v. Piccioli*, 352 F.2d 856 (2d Cir. 1965), vacated, 390 U.S. 202 (1968); or failed to exercise his discretion in imposing sentence, *United States v. Kaylor*, 491 F.2d 1133 (2d Cir. 1974), vacated, 418 U.S. 909 (1974), corrective action may be taken by an appellate court. However, these situations are not presented here.

A. Andy Castro

The basis for Judge Zampano's imposition of an eighteen-month sentence on Castro was the presentence report. Castro does not claim that any of the material in that report, which had been made available to him, was incorrect or inaccurate. Rather, he claims an abuse of discretion by the Court, in that he received the most severe sentence. It is clear that Judge Zampano did, in fact, exercise his discretion. Both the defendant's family background and personality were considered by the Judge. (C. App. 93). The fact that the Judge found that Castro was motivated by a profit motive, and was, unquestionably, a distributor of controlled substances were the significant factors used by the Judge in exercising his discretion. There were thus ample reasons, as set forth in the record, for the sentence imposed upon Castro; there is nothing in the record to indicate an abuse of discretion in the sentence imposed.

Castro argues, however, that the mere fact that there was a discrepancy between the sentence imposed upon him and upon his two co-defendants itself indicates that the sentencing judge abused his discretion. This argument, however, ignores the facts of the case. Palter cooperated with the Government, and was entitled to consideration for his cooperation. Additionally, Palter's role in the conspiracy, as set forth in the Government's factual presentation, was substantially different. Castro in fact distributed controlled substances, while Palter and Davies, the other co-defendants, who both played important roles, were themselves not distributors. Additionally, there was evidence that Castro was prepared to leave the operation, and start a drug manufacturing scheme on his own. All of these factors, we submit, provided more than an ample basis for the trial judge to impose a sentence upon Castro which was more severe than that of either of his co-defendants.

B. Daniel Scott Palter

Palter's claim differs from that of Castro in that Palter received the *least* severe sentence of the three. A lawyer and the individual in a management position in the conspiracy to manufacture amphetamine and meth-aqualone, Palter suffered from several psychological problems. And, indeed, the sentencing judge gave due consideration to these psychological problems, indicating that but for them, Palter would have received a more severe sentence. P.App. 30-31. In order to make the sentence even more lenient, the Court not only recommended that Palter be committed to the Metropolitan Correctional Center, New York, for service of his sentence, but also indicated that if Palter was not incarcerated there, he would entertain a Rule 35 motion for reduction of Palter's sentence. P.App. 32. Rather than following this procedure, however, Palter now claims an abuse of discretion in not making his sentence even more lenient by allowing him to serve it on weekends.

Every consideration possible was given to Palter by the sentencing judge. His psychological problems were considered to their fullest extent possible. Nevertheless, the Court still felt that

I think all these factors save Mr. Palter quite a bit of time of incarceration, but I just can't overlook the fact and put him on probation, and particularly since he was in it so long and he had this legal training and has this mental ability.

P.App. 31.

Thus, Palter cannot claim that he was sentenced based upon erroneous information, or, indeed, that he was sentenced for the wrong reasons. The most that he can claim is that, based upon the material before the Judge, the Court below should have imposed a different sentence.

The situation here, then, is no different than in *United States v. Kaplan, supra*; this Court cannot substitute its judgment with respect to sentence for the judgment of the Court below.⁴

This case is completely dissimilar from *United States v. Ramos*, Slip Op. 1575 (2d Cir. Docket No. 77-1271, Feb. 15, 1978), where no reasons for selecting a particularly harsh sentence were stated by the Court. Here, extremely lenient sentences are the subject of the appeal. Additionally, here the Court below fully articulated its reasons for imposing the particular sentences. However, as the Court noted in *United States v. Ramos, supra*, Slip Op. at 1578,

“[W]e are mindful of an appellate policy of giving the broadest discretion to the sentencing judge.
...”

It is precisely that discretion that Appellants seek to review here. Since the sentences were lenient, since full reasons for imposing them were articulated by the Court, because no improper reasons were relied upon by the Court in selecting these sentences, and because the sentences were not based upon improper information, the sentences imposed should not be overturned by this Court.

⁴ Palter also claims that the sentence was invalid because it was not “individualized”. Brief for Appellant Palter 25. Nothing could be further from the truth. The sentence was clearly individualized; the Appellant’s real quarrel is that it required any period of incarceration at all.

II.

The Guilty Pleas in This Case Complied With Rule 11 of the Federal Rules of Criminal Procedure.

Both Palter and Castro assert that the Court below erred in not advising them, upon accepting their guilty pleas, that the mandatory special parole term which the Court was required to impose under the statute, 21 U.S.C. Section 846, could last for as long as their lives. Palter further argues that the Court failed to advise him of his right to a jury trial should the plea not be accepted, and of his right not to incriminate himself should he go to trial. The full test of the colloquy which took place before the pleas were accepted is to be found in C.App. 41, and in P.App. 15-16.

This Court, in *United States v. Alejanaro*, — F.2d — (2d Cir. Docket No. 77-1338, February 9, 1978, Slip Op. 1517) has held that a judge, in accepting a plea of guilty to an offense involving a violation of the Controlled Substances Act of 1970, 21 U.S.C. 801 *et seq.*, must, pursuant to Rule 11, F.R.Crim.P., advise the defendant that he is subject to a mandatory special parole term which could last as long as his life. The Court further stated that advice to a defendant about a mandatory minimum special parole term will not suffice, absent an indication that the defendant understood the words "at least" or "minimum parole term" to mean that the term itself could be much longer than the minimum.

Admittedly, the Court below did not advise either Palter or Castro that the mandatory special parole term could run as long as they lived. However, there are certain distinguishing factors present here which were not present in either *United States v. Alejandro*, *supra*, or in *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976). There is nothing here to indicate that even if they had been advised of the fact that the special parole

term could last for life, Palter and Castro would not have pleaded guilty. Both were represented by experienced counsel; both answered the Judge's question as to whether or not they understood what a mandatory special parole term was by stating that it had been explained to them by counsel. P.App. 16; C.App. 41. Palter himself is a lawyer. Neither defendant received anything more than the minimum special parole term, two years; as to both defendants, the remaining count in the Indictment was dismissed by the Government upon their sentencing. The full extent of Palter's cooperation was made known to the sentencing Judge. Thus, both Defendants received the full extent of their plea bargain with the Government. It is thus clear that neither Defendant suffered an prejudice whatsoever; it is thus well to consider, in this case, Judge Hays' dissenting opinion in *United States v. Alejandro, supra*.

The extreme remedy of *vacatur* and remand for repleading is especially inappropriate here. The appellant has failed to allege that he was, in any way, prejudiced by the district court's "limited" non-compliance with Rule 11(c), or that, had he been adequately informed, he would not have pleaded guilty. On the other hand, the appellant has already fully enjoyed the benefit of his plea agreement; as promised, following imposition of sentence by Judge Bramwell, the United States Attorney's Office for the Southern District of New York dropped independent charges against appellant.

United States v. Alejandro, supra, Slip Op. at 1521-22.

In both cases here, the Court advised Palter and Castro that they were subject to a mandatory *minimum* special parole term of two years. P.App. 16; C.App. 41. Both acknowledged that their attorneys had explained this to them. Thus, the situation here is quite different from

that in *Alejandro*, where the defendant understood the mandatory minimum special parole term to be a "three year special", or in *Journet*, *supra*, where other substantial deficiencies were present. Since both Defendants indicated that the mandatory special parole term had been explained to them by counsel, and since the trial court indicated in both instances that it was a minimum term which had to be imposed, *Alejandro* requires that the pleas in this case be sustained. Cf. *United States v. Bachner*, 517 F.2d 589, 595 (7th Cir. 1975).⁵

Palter also claims that the Court failed to advise him (1) of his right not to incriminate himself if he went to trial and (2) of his right to a jury trial. Again, it must be reiterated that Palter had engaged in plea negotiations with the Government, that each promise that had been made to him by the Government was fulfilled, and that he was represented by experienced, retained counsel. It must also be recalled that Palter himself is an attorney. He was advised by the Court that he was waiving his "constitutional rights" by pleading guilty, P.App. 13, and he indicated that he understood this fact. He had already given a complete statement to the Government as a part of his plea bargain, a statement in which he had already incriminated himself. Thus, under these circumstances, such advice would, at best, have been superfluous. Cf. *United States v. Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977).

The Court below also advised Palter of his right to have a trial, should he decide not to plead guilty. P.App. 13. Again, Palter, while not specifically advised of his right to a jury trial, was advised that he could call witnesses, confront the Government's witnesses against him,

⁵ In both *United States v. Alejandro*, *supra*, and *United States v. Journet*, *supra*, the mandatory special parole term substantially exceeded the statutory minimum. Here, of course, the term imposed was just the statutory minimum, and no more.

and require the Government to prove the case against him beyond a reasonable doubt. It is inconceivable that Palter could have understood this advice to mean anything other than a jury trial. A lawyer himself, represented by counsel, he stated to the Court his understanding of this right, and of the Judge's advice to him. See *United States v. Saft*, 558 F.2d 1073, 1080-81 (2d Cir. 1977). This Court has never required a mechanical application of Rule 11, yet the thrust of Palter's argument, if accepted, would require just that.⁶

CONCLUSION

For all the foregoing reasons, the Government urges this Court to affirm the judgments of the Court below.

Respectfully submitted,

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⁶ This Court, in *United States v. Saft*, *supra* at 1079, has held, with respect to Rule 11(c),

Congress meant to strip district judges of freedom to decide *what* they must explain to a defendant who wishes to plead guilty, not to tell them precisely *how* to perform this important task. . . . (emphasis in original).



**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-1481 &
78-1001

U. S. A.,
vs. APPELLEE

DANIEL SCOTT PALTER and ANDY CASTRO,
APPELLANTS

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn, New York

That on the 30th day of March, 1978, deponent served the within Brief
upon Sheila Ginsberg, Esq., Phillips, Nizer, Benjamin, Krim & Balon, 40 West 50th St.,
New York, N.Y. 10019; and Andrew B. Bowman, Esq., Federal Public Defender,
770 Chapel Street, New Haven, Conn. 06510

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 30th day of March, 1978

PATRICIA D. O'HARA, Notary Public
State of New York, No. 31-4654987
Qualified in New York County
Cert. Filed in Kings County
Commission Expires March 30, 1979

Patricia D. O'Hara